UNITED STATES BANKRUPTCY COURT
DISTRICT OF DELAWARE

IN RE:	.	Case No. 99-00108 (MFW) through
	.	Case No. 99-00127 (MFW)
	.	
WORLDWIDE DIRECT,	.	
INC., et al.,	.	824 Market Street
	.	Wilmington, Delaware 19801
	.	
Debtors.	.	February 8, 2005
. . . . .		11:37 a.m.

TRANSCRIPT OF AGENDA HEARING
BEFORE HONORABLE MARY F. WALRATH
UNITED STATES BANKRUPTCY COURT JUDGE

APPEARANCES:

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THE CLERK: All rise. You may be seated.

THE COURT: Good morning.

UNIDENTIFIED ATTORNEY: Good morning.

UNIDENTIFIED ATTORNEY: Good morning, Your Honor.

THE COURT: You're going to have to sit at the table, the middle microphone has been shut off.

MR. KORTANEK: Good morning, Your Honor. Steve Kortanek, with Klehr Harrison. We're co-counsel to the liquidating trustee.

And essentially, Your Honor, we have two matters on today's agenda scheduled to go forward. One is our motion, filed two cycles ago, to enforce Your Honor's order regarding the Hennigan Bennett final fee application. And then, in a related vein, Hennigan Bennett did file a -- its own fee application.

We have been proceeding with the -- with our motion going first, as Item 2.

With me, today, is Mr. Paul DeFillipo of the Wolmuth firm, who has been admitted pro hac vice, and if Your Honor please, he can begin with Item 2.

THE COURT: All right. Thank you.

MR. DEFILLIPO: Good morning, Your Honor.

THE COURT: Please remain seated.

MR. DEFILLIPO: Okay. Thank you.

THE COURT: Sorry. While we have this temporary

system in, make sure you're talking into the mike.

MR. DEFILLIPO: Very well. Your Honor, briefly, the background I'm sure you're familiar with, but on July 1st, or thereabouts, the plan became effective, the liquidating trustee was appointed, and shortly after that, he asked the professionals in this case for a seven percent fee reduction.

That would have come to $411,000.00 for the Hennigan firm. We attached the Hennigan firm's response to that request, dated October 2nd, 2001, in which they indicated they would not agree to a one penny reduction in their fees.

So, the trustee filed an objection. The Court disallowed approximately $380,000.00 of the Hennigan Firm's application, based primarily on their markup of temporary attorney time, which was, they -- they concede, the focus of the hearing.

The Court entered an order which required disgorgement of the excess. And I wrote two letters to the Hennigan Firm, November 1st and November 18th, attaching the liquidating trustee's calculation of approximately $399,000.00 in fee overpayments to that firm and requesting that they make payment in accordance with the Court's order.

On December 8th, the Hennigan firm wrote back and said, we would not -- they would not pay us.

And on December 16th, we filed a motion to compel payment, on the basis that a party just can't refuse to perform

an order of the Court. If they think it's wrong, they should appeal from it. The Hennigan firm did not appeal, nor did they seek a stay.

After we filed the motion, the Hennigan firm made a partial payment on account of the disgorgement order, but held back about 231,000 and filed a supplemental fee application in that amount.

We filed an objection to that supplemental fee application on the basis that the supplemental fees do not meet the standard, under Section 330, for approval, on the basis that they are neither necessary, nor beneficial, or reasonably likely to have been beneficial at the time they were performed. And the application does not explain why either standard has been met.

In our view, the client that Hennigan represented did not require the services, since it was liquidated at the time, and Hennigan performed those services for itself.

We argue that this is a case where the American Rules should apply, and each party should bear its own litigation expenses, that no exception to the American Rule applies, that this is not a common fund case, that there's no agreement to make payment to the firm, that this is -- there's been no showing of bad faith, or violation of a Court order, and 330 is not a statute which shifts the fees to the loser.

And we cited cases, in our objection to the Court,

that stand for that proposition. So, the prevailing party argument does not fly, under Section 330 either.

And the comparable compensation argument doesn't work because if we were outside this Court, they would not be allowed to recover those fees from a client, if they had to sue to collect. And that's the basis for comparable compensation, is what you would get outside of this Court.

Even the Ninth Circuit Smith case, that they rely heavily on, says that an applicant must show that litigation was necessary in order for it to be compensable.

Here, litigation was not necessary. Our first offer was 411,000. They refused to even negotiate. And as the Court found, there were almost $400,000.00 in objectionable fees. We could have avoided this litigation, had the firm negotiated with us, as we did with all other professionals in the case. They chose to litigate. We don't think their litigation expenses should be payable by the estate.

THE COURT: All right. I'll hear from Hennigan Bonnett.

MR. JOHNSTON: Thank you, Your Honor. Jim Johnston, on behalf of the firm. It's a pleasure to be back here and I compliment you on your new courtroom.

THE COURT: Thank you.

MR. JOHNSTON: It looks good. Since Mr. DeFillipo's argument really combined the issues of the motion to compel and

our application, I think it makes sense to take our application, first.

What we've requested is 86 percent of the reasonable fees and expenses that we incurred in defending against the liquidating trust's $2.7 -- excuse me -- million objection to our final fees and expenses.

Your Honor, this was not your usual dispute regarding fees. My firm's heard these estates for two and a half years without a single objection to our retention or to our fees. Our clients didn't object, the creditors didn't object, the U.S. Trustee didn't object.

It was only after confirmation and effectiveness of the plan that the liquidating trust objected. In concept, we don't have any problem with that. That was the trust's right, under the plan.

What we did have a problem with was the way that the objection was raised and prosecuted. You know, first the size itself. The trust objected to more than $2.7 million of our fees. This was 40 percent of our total request. Essentially, more than a year's worth of our work.

And what was unusual, in addition to the size, was the way in which that very large objection was made. Before choosing to launch an attack of that magnitude, a responsible fiduciary would perform enough investigation to ensure that there was at least some colorable basis for an objection to all

of the fees. Here the evidence revealed that that was not at all what happened.

The liquidating trustee filed the objection without even reading our fee application. He didn't review any of our work product, or discuss our services with our clients, or the board members, or any creditors. And it didn't raise or discuss a single objection with us.

What the trust chose to do, instead, was to file a one paragraph objection that attached the Legal Cost Control report, even though that report, on its face, stated that it was a "draft report" and that it was prepared to give the professional, HBD, a chance to address concerns.

And the trustee testified, in his deposition, that he'd never even spoken with Legal Cost Control about the report, and the evidence showed that he had not even read the whole report.

Your Honor's now found that the Legal Cost Control report was entirely unreliable, both as a factual matter and as purported expert testimony. We submit that should have been obvious to the trustee, from the outset, at least if he had read the report, or talked to its authors.

The report states that no one from LCC contacted HBD, reviewed any of our work product, or did anything to familiarize itself with the issues in the case.

But, what the trustee did was attach that to its

objection, and filed it, and demanded the return of $2.7 million in fees. That's unusual point number one.

Unusual point number two, is the trustee then proceeded to litigate in the same way that the objection was made. He demanded the production of virtually every document in our files, regarding this case, including all of our work product.

At very great expense, we wound up producing 500 boxes of documents to the trustee, in addition to four CD-ROM's worth of electronic files. After we produced it, the trustee scarcely -- scarcely even bothered to review the documents.

The trust then deposed me for an entire day. The trust objected to our narrowly tailored request to the trust and to the trust board members.

And because the trust refused to abandon what we submit was an obviously flawed LCC report, we were forced to depose two members of the LCC team that worked to prepare the report. And we had to expend an extensive amount of the Court's time, cross examining Mr. Markowitz.

All of this turned what could and should have been a summary review of our fees, into a very costly exercise, for us, for the trust, and for the Court.

And what a waste it was, Your Honor. Especially when you consider that the trust decided to abandon all but four of the 24 categories of objections that were raised in the LCC

report, immediately on the eve of trial.

And at the end of the day, Your Honor, we prevailed, overwhelmingly. We prevailed on virtually all of the issues raised in the trust's original objection.

And even when you take the temporary attorney issue into account, we prevailed on more than 86 percent of the fees the trust objected to and more than half of the fees relating to temporary attorneys themselves.

In its objection to our fees, and this morning, you heard Mr. DeFilippo basically call all of this irrelevant.

The trust argues that the American Rule applies, there's no prevailing party in bankruptcy cases, and we couldn't have possibly benefitted the estate.

We submit, Your Honor, that the vast way of authority is to the contrary. At the outset, we are not seeking to reverse the American Rule, or impose any kind of prevailing party standard. All that we're requesting is an award of reasonable fees and expenses for our services in this case.

Your Honor has --

THE COURT: Didn't I award you your fees in this case?

MR. JOHNSTON: You absolutely did and we have no quarrel with your ruling.

All that we request is that that award not be diluted by the fees and expenses that we had to incur in defending

against the trust's $2.7 million objection.

THE COURT: Well, how did that benefit the estate?

MR. JOHNSTON: It benefitted the estate, and this is what the case law says, by fixing -- by enabling the Court to fix the amount of our fees. The Court fixed the amount of our fees, only after a one year, two day trial process.

The benefit to the estate was enabling the Court to determine the validity, or lack of validity of the trust's objections, and to fix the amount of our fees.

The cases say --

THE COURT: Well, I could have done that by sustaining the objection. And if you had never even responded to the objection I could have fixed your fee.

MR. JOHNSTON: You absolutely could have. And then we wouldn't have been put through the process, our fee wouldn't have been diluted.

THE COURT: Oh, it would have been diluted, if I had sustained their objection.

MR. JOHNSTON: It wouldn't have been diluted by the litigation fees and expenses incurred in responding to the objection.

I think, Your Honor -- and hindsight is 20/20, had you just looked at the auditor's report, I don't think that you would have disallowed $2.7 million in our fees. But, certainly, we had to go to the time and expense, and it was

great time and expense, to establish to the Court the unreliability of that report.

You'll recall, Your Honor --

THE COURT: Yes.

MR. JOHNSTON: -- Mr. Markowitz on the stand for many hours, trying to defend what was indefensible work product.

THE COURT: Well, that's true. But, wasn't that for your benefit, not for the estate?

MR. JOHNSTON: Ultimately, yes. It certainly was for our benefit, but that is not the be-all and end-all of the Court's inquiry.

And I think there are two fundamental principles that I'd like to walk the Court through. The first is that articulated by the Third Circuit in the Busy Beaver case, where the Circuit observed that one of Congress's important objectives, in overhauling the bankruptcy laws in 1978, was to provide "fully competitive income to bankruptcy attorneys."

A number of cases have considered that plain legislative -- intent of the Bankruptcy Code, and they've determined that this goal of competitive income to bankruptcy attorneys would be frustrated if professionals and bankruptcy attorneys were not entitled to be reimbursed for reasonable fees and expenses in fending off meritless objections to their fees.

We cited five cases in our application, two at the

Circuit level, two at the District Court level, and one at the Bankruptcy Court level, which are all directly on point. They all directly hold that these types of fees are reimbursable.

THE COURT: Well --

MR. JOHNSTON: We also --

THE COURT: But, how do they provide a benefit and how are they, under Busy Beaver, comparable to what you get outside of bankruptcy? If you litigate your fees outside of bankruptcy, you don't get paid for litigation fees.

MR. JOHNSTON: Well, that's the second key point, which is that --

THE COURT: Well, the first -- what is the first point? That other Courts have allowed it?

MR. JOHNSTON: No. The first key point is that the touchstone of compensation, in bankruptcy, is comparable compensation --

THE COURT: Correct.

MR. JOHNSTON: -- for non-bankruptcy professionals.

The flip-side to that, and what you heard Mr. DeFillipo argue, is that, well, fee disputes are routine, both in bankruptcy and non-bankruptcy cases, and outside of bankruptcy you don't get reimbursed for this, so why should you get reimbursed for it in bankruptcy?

One -- the Third Circuit touched upon this, in Busy Beaver, if you take a look at footnote 17, where the Circuit

cited the Powlack v. Greenawald (phonetic) case, noting that, if attorneys are required to litigate for their fees, they're not fully -- their compensation is diluted. They're not fully compensable.

And the Court also noted that there are unique aspects of the bankruptcy fee application and compensation process that doesn't happen outside of the bankruptcy case -- outside of bankruptcy cases.

To compare bankruptcy cases to non-bankruptcy cases, really isn't a fair comparison. Bankruptcy is unique.

If you take a look at the decision, the Ninth Circuit's decision in Smith, the Big Rivers case, the Nunley case, they all talk about this fact and then they all talk about the fact that disputes over fees, in the bankruptcy context, are not analogous to attorney/client disputes outside of bankruptcy.

I think this case demonstrates that point with some force. Here, our clients, the debtors, were perfectly satisfied with our work. They didn't raise any objection to our fees. Neither did the creditors, the creditors committee, U.S. Trustee.

It was only after the case was over, from our perspective, that an objection was raised. That would not have happened outside of the bankruptcy context and it certainly wouldn't have happened in the manner that the objection was

raised here.

(Pause)

MR. JOHNSTON: I see Your Honor struggling with the point and I'd like to help you through it, as much as possible.

THE COURT: Well, the representative of the estate, the estate was your client.

MR. JOHNSTON: That's correct.

THE COURT: The representative of the estate did, in fact, object to your fees.

MR. JOHNSTON: At the end of the day --

THE COURT: Right.

MR. JOHNSTON: -- that's true. But, the comparison to say, in a non-bankruptcy situation our client objected to our fees, doesn't hold here.

THE COURT: Why?

MR. JOHNSTON: Because, the people that we actually performed the work for, the people that we were reporting to for two and a half years, never objected. No party in interest in the case ever objected, for two and a half years, despite many, many opportunities to do so.

I can't think of a context outside of the bankruptcy context where a law firm would be put in the position of working for two and a half years, without one iota of -- one inkling that there was any complaint or objection to the nature of the firm's services, or to the fees, and then -- and be paid

for all of those fees, and then be sued, after the fact, to recover the fees, by someone who had nothing to do with the original engagement.

That -- bankruptcy's unique in that regard and the Third Circuit has recognized it --

THE COURT: But, what -- if somebody who has a legitimate interest, does object, why should you be entitled to attorney's fees for defending your fees?

MR. JOHNSTON: It goes back to the point of market based non-diluted compensation. That, we submit, is a policy --

THE COURT: Well, it's not market based, if there's nothing outside of bankruptcy that's comparable.

MR. JOHNSTON: That -- when you would not receive the type of objection that you received in bankruptcy, when you wouldn't receive it outside of bankruptcy, the cases say that the professionals are entitled to be compensated to makeup for the delusion that occurs in having to fend off the objections.

And the clear weight of authority is to that effect. There's a number of cases that expressly hold that Court's are entitled to award these types of fees and the trust has really cited only one case to the contrary.

That -- all of the cases that they cited do not involve applications for fees incurred in fending off objections, at the Trial Court level, with the exception of

one.

And that one case is the St. Rita's Associates case out of the Western District of New York. I think that's closest to the point that the trustee tries to make, but it winds up resting on a faulty premise and it results in a strange contradiction.

In St. Rita's, the Court did hold that the debtor's attorney was not entitled to an award of fees incurred in defending against an objection made in the bankruptcy case. But, then the Court turned around and held that the attorney was entitled to an award of expenses it incurred in the fee dispute.

That's a contradictory result, where expenses are allowed and fees are disallowed. To my knowledge that's never been followed or adopted anywhere.

But, the decision is premised on an assertion that fee disputes are a fact of life for all attorneys in bankruptcy and outside of bankruptcy, so why should bankruptcy attorneys be treated differently.

As I indicated, Your Honor, I just don't think that's a fair comparison, particularly in this case, where it's not conceivable that a law firm would be faced with objections of the type that were raised in this case.

I would like to call the Court's attention to one case that I discovered, in shepardizing St. Rita's, that wasn't

cited in our papers, that I think really summarizes these issues nicely. And it was a Court that was clearly struggling, like Your Honor's struggling, with, how do you find a basis for awarding fees in appropriate circumstances.

It's a case called Computer Learning Centers, out of the Eastern District of Virginia, 285 B.R. 191. There, the Court surveyed much of the case law, including many of the cases that we cited, and it wound up rejecting the arguments made by the trust -- like those made by the trustee, based on the American Rule and no benefit to the estate.

And the Court synthesized what I would submit is an appropriate way of looking at this and developed some factors. I'd like to just quote a brief passage.

The Court said, "Good faith and professionalism should be encouraged in the fee application process and the impact of the allowance or denial of additional fees for defending a fee application should be minimized. These objectives, as well as the Congressional objective of compensating professionals the same, whether they are engaged in a bankruptcy case or in a non-bankruptcy matter, are furthered by allowing fees to successfully present, prosecute, or defend a fee application, in appropriate circumstances."

It then goes on to describe what it considers would be appropriate circumstances. "Factors that may be taken into account in deciding whether to award additional fees for

defending a fee application are, one, whether the application was accurate and complete, two, whether the application complied with all applicable standards, three, whether the objections were made in good faith, four, the extent of additional work reasonably necessary under the circumstances, and five, the extent to which the -- the requested fees were rewarded."

We submit, Your Honor, that if you apply those factors here, and we think they make sense, the supplemental fee and expense award that we've requested is appropriate.

You know, first, was our fee application accurate and complete and did it comply with the applicable standards? I think the answer to that is absolutely, as evidenced by Your Honor overruling virtually all of the timekeeping type objections raised in the LCC report.

Second, were the trust's objections made in good faith? We submit that they were not, Your Honor, for all of the reasons outlined in our papers. The very fact that the trust objected to 2.7 million in fees, and prevailed on just 380,000 of the objections, tends to show a lack of good faith, as does the way in which the objections were prosecuted.

Third, was our additional work reasonably necessary under the circumstances? Again, yes. The mud against the wall approach, adopted by the trust in objecting to such a large portion of our fees, left us with no choice but to take the

steps we took to defend ourself.

And fourth, as to the extent to which our requested fees were awarded, well, we prevailed on 95 percent of our requested fees and over 86 percent of the fees that were subject to an objection. We would submit that that's success by any measure.

Nevertheless, as noted in our application, we seek only 86 percent of the fees and expenses we requested -- or of the fees and expenses we incurred, to account for the fact that Your Honor did disallow some of our fees.

Before I conclude, let me just briefly address the argument regarding the trust's alleged settlement offer. I note that the trust's emphasis on this alleged offer is a bit ironic, given that they tried very hard to keep the evidence of the offer out of the record of these proceedings and filed and lost a motion in limine on that point.

That aside, I'm not sure of the point being made here. I guess it's they say we should have agreed to settle, and I'll use that word loosely, for $412,000.00, and thus saved our expense of litigating.

But, that's looking at it the wrong way. The point might have made some sense if the trust had objected to $411,000.00 of our fees, and the Court then had sustained $380,000.00 of the objections. That's not what happened.

The trust objected to millions and millions of

dollars of our fees, only a fraction of which were sustained.

Moreover, the notion that the trust made a good faith settlement offer to HBD is ludicrous. As we noted before, the offer was made before the trust even reviewed our fee application. It said so right on its face.

The trust merely made a demand to every professional employed in this case, for an across the board seven percent reduction. And then it threatened to hire a fee auditor if the demand was not acceded to. That's not a settlement offer, that's a shakedown.

In the letter, the trust didn't identify a single ground for objection to HBD's fees, and we welcomed an independent fee auditor in this case, so we didn't agree to what was an unprincipled demand for a reduction.

That, then, cannot authorize the trust to turn around and object to 40 percent of all of our fees, and deprive us of the right to recover our costs in defending ourselves.

And so, we would submit Your Honor, and respectfully request an award of reasonable fees incurred, in fending off the trust's objection to our final fee application.

THE COURT: Any response?

MR. DEFILLIPO: No, Your Honor. Thank you.

(Pause)

THE COURT: Well, if I were to apply the Computer Learning Center factors, I would agree with Hennigan Bennett,

in large part, that they meet those.

I think that the fee application was largely compliant with the rules, although I do note that the one disallowance I made was based on the temporary employees, and I'm not sure full disclosure was made as to the terms of their retention and the fact that the firm was charging overhead as a basis of their hourly rates. So, that factor I think is somewhat different.

But, the other factors I think, in large part the objection of the trustee, did not have a sound basis in fact, although I don't go so far as to say it was in bad faith.

In large part the fees were allowed by the Court for the Hennigan Bennett request. I don't know whether I'd say the additional work was needed, but certainly it did flesh out the issues for the Court.

But, I disagree with the Courts that say, excepting extraordinary circumstances, that a professional would be entitled to compensation for fees incurred in objecting -- excuse me, in responding to objections to fees they have requested.

I think that the benefit by responding to those objections is for the benefit of the professional, not the estate. And I think a rule, to that extent, would not be appropriate.

I don't think I'm bound by Busy Beaver to hold

otherwise, because Busy Beaver simply said that the fees awarded should be comparable to those of professionals outside of bankruptcy.

And under the American Rule, fees in litigating either objections to fees or refusal to pay fees are borne by the party who encouraged them, not by the prevailing party.

So, I decline to award any fees in this circumstance. I don't think this would rise to the exceptional circumstance where I may in fact award fees.

I think that the fees incurred by Hennigan Bennett were simply to assure that it got itself paid. Although it was unusual, in that there was a two day hearing on it, I think that is simply the cost of doing business.

I came to my refusal to permit fees for litigating a retention application, so I'll disallow the fee application.

I don't think I need to go forward with the trustee's motion, since I assume Hennigan Bennett will otherwise disgorge the remainder of the fees awarded.

MR. MCMICHAEL: We will tender the check --

THE COURT: Not awarded.

MR. MCMICHAEL: We will tender the check immediately.

Your Honor, one request in the trustee's motion was for Your Honor to award prejudgment interest. We continue to object to that request and submit that it's not appropriate.

MR. DEFILLIPO: We withdraw it, Your Honor.

THE COURT: All right. Thank you.

MR. JOHNSTON: Thank you, Your Honor.

MR. DEFILLIPO: Thank you, Your Honor.

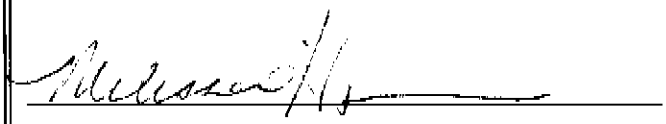
MR. KORTANEK: We have no other matters going forward.

THE COURT: All right. We'll stand adjourned. Thank you.

* * * * *

C E R T I F I C A T I O N

I, MELISSA HYNES, court approved transcriber, certify that the foregoing is a correct transcript from the official electronic sound recording of the proceedings, in the above-entitled matter, to the best of my ability.



MELISSA HYNES

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